No. 12427

In the United States Court of Appeals for the Ninth Circuit

COMMODITY CREDIT CORPORATION, APPELLANT

v.

PETALUMA AND SANTA ROSA RAILROAD COMPANY, A CORPORATION, APPELLEE

ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

APPELLANT'S REPLY BRIEF

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AUTHORITIES CITED

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A. Significant errors in appellee's brief

Appellee errs significantly in arguing as follows:

Error 1. That the tariffs plainly support appellee's interpretation without ambiguity and that this Court cannot avoid it, however "unjust, unreasonable, discriminatory, prejudicial, and unlawful" it may be (Appellee, p. 15).

Appellant has no doubt but that this Court can avoid the discriminatory interpretation, and it should do so in the interest of simple fairness. There was plenty of ambiguity.

Error 2. That the shipments must be treated as "through" shipments at Sweetgrass, *tariffwise,* instead of as combinations of a local shipment into Sweetgrass and a local (or flat) shipment out of Sweetgrass.

There was no rate through Sweetgrass. Tariffwise, these were, of course, combinations of shipments.

Error 3. That the carriers' formal "clarification" of the Great Northern rule, which explicitly defined its application to this type of situation, was really not a clarification (although so characterized on its face), but was instead a rate decrease misleadingly labeled.

See discussion below.

Error 4. That to qualify for the low rate from Sweetgrass either the Canadian shipper or appellant should have had the cars unloaded and reloaded at Sweetgrass.

This would be a meaningless wasteful and uneconomic ceremony and is never required for a reshipment.

Error 5. That the shipments did not become subject to the "combination of rates" provided in the Great Northern tariff and tariff rule until they arrived at Spokane (Appellee, p. 4).

They became subject to such a combination at Sweetgrass, and the carriers themselves so urged. See discussion below.

Error 6. That there was an Interstate Commerce Commission "decision" against appellant on this issue which is entitled to "great weight" by this Court (Appellee, p. 6).

The trial court rejected the letter from Mr. Bartel which appellee prints in its Appendix. "In any event the Secretary to the Commission was without authority to bind the Commission in this matter." *Thompson* v. *Texas Mexican R. Co.,* 328 U. S. 134, 146. The facts were not fully presented or considered, nor were the tariffs examined.

Error 7. That "no good purpose will be served" by the Court's considering appellant's demonstration that appellee's interpretation is absurd.

If the shipments could be shown to have stopped twice in Canada instead of just once, then appellee would grant the low rate in the United States; so appellee is penalizing appellant because the shipments had received too many Canadian stops and also *too few.* This *reductio ad absurdum* is irrefutable and performs the good purpose of showing that under appellee's interpretation the rule becomes absurd.

Error 8. That the transactions at Sweetgrass did not occur at Sweetgrass because of any reconsignment (or "fiction of reconsignment") there but "solely for the reason that that happened to be the most convenient point from the standpoint of railroad operations where these instructions could be accomplished," and that Ogden was the true destination (Appellee, p. 21).

Error 9. That it is "certainly unique and novel" for appellant to be willing to waive the privilege of having the reshipment at Sweetgrass treated as a reconsignment—if the Court should find appellant's interpretation of the rule wrong and appellee's right.

In that event, the "privilege" would be merely the dubious privilege of paying more taxpayers' funds to the carriers, which appellant ought to be entitled to waive. Appellee affects not to perceive appellant's important Point B (Appellant, pp. 23–25).

B. Of course the tariffs are ambiguous

This controversy itself evidences plenty of ambiguity. It began when appellee's agent presented the freight

bills on the original basis (which is still appellant's basis) and then changed over to the revised basis (which is appellee's present basis). Appellee says (p. 10) that "it is difficult to follow appellant's reasoning that because this was done there was ambiguity." Would appellee seriously argue that because this was done there was clarity?

The clarification

While admitting that the carriers' amendment to the Great Northern rule purported to be for "clarification", appellee's view is that it was really not clarification at all but an alteration in substance, which should be ignored under *Southern Pacific Co.* v. *Lothrop,* 15 F. (2d) 486, and *Louisville & Nashville Ry Co.* v. *Speed-Parker Inc.* 137 So. 724 (Appellee, p. 13). The significance of the amendment, however, was that it was not an alteration in substance. That is what "clarification" means. The Interstate Commerce Commission's Rule 2 (a) in its Tariff Circular 20 requires that all amendments be marked by uniform symbols as either reductions in the rate, increases in the rate, or amendments which do not reduce or increase the rate. All changes in language must be marked with the proper symbol showing just which kind of amendment is involved. The amendment in question bore the symbol of the last type, that is, an amendment which did not increase or decrease the rate.

Tariff Rule 2 (a) reads as follows:

Changes to be indicated in tariff or supplement.

2. (*a*) All tariff publications and supplements thereto must indicate changes thereby made in existing rates or charges, rules, regulations or practices, or classifications by use

of the following uniform symbols in connection with such change:

♦ to denote reductions.

◆ to denote increases.

▲ to denote changes in wording which result in neither increases nor reductions in charges.

The title page of the tariff supplement containing the amendment corresponds to the title page of the original (R. 66) except that the supplement is numbered "Supplement No. 61 to G. N. Ry. G. F. O. No. 1240–P, I. C. C. No. A–8137." The amendment to Rule 143 appears on page 10, the relevant portion of which reads as follows:

SECTION 2

RULES AND CHARGES GOVERNING GRAIN; SCREENINGS FROM GRAIN, UNGROUND, CONTAINING NOT MORE THAN 5 PER CENT OF FLAXSEED; SEEDS (FIELD OR GRASS); SOYBEANS; HAY; STRAW; CORN HUSKS OR CORN SHUCKS, AND PUMMIES, UNGROUND; CARLOADS, STOPPED FOR INSPECTION AND DISPOSITION ORDERS INCIDENT THERETO; ALSO RULES AND CHARGES GOVERNING GRAIN OR SEEDS, CARLOADS, HELD OR STOPPED AT SAMPLING POINT.

ø#Ⓔ Item No. 143–E Cancels 143–D. Cars Placed on Track for Inspection and Held for Disposition Orders.

ø Effective February 26, 1949, except as noted.

Effective February 14, 1949, on Montana Intrastate traffic. Issued on twenty days' notice under authority of Mont. R. C. Authorization No. 2057 of December 14, 1948.

Ⓔ Expires with December 31, 1949, unless sooner cancelled, changed, or extended.

Not more than two inspections (or one inspection in addition to a diversion or reconsignment without inspection) en route and one inspection (or diversion or reconsignment) within the switching limits of the destination at which the car is unloaded will be permitted; Provided, that if, after car has received the two inspections (or one inspection and one diversion or reconsignment) en route authorized in this rule, it is subsequently inspected (or diverted or reconsigned) and reforwarded without unloading, it will be subject to the combination of tariff rates applicable on a shipment terminating at and on a shipment originating at the point at which such subsequent inspection (or diversion or reconsignment) is performed in effect on date of shipment from point of origin.

In applying this rule, the number of stops for inspection (or diversion or reconsignments without inspection) shall be reckoned from the last point of loading of car, ▲ or the point where the car comes in possession of carriers within the United States, or from the point at which it becomes subject to combination of rates as provided in this rule.

(SF 5963–1186)

[33] ‡ Item No. 148. Disposition order when an embargo is in force.

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[33] Reissued from Supplement No. 33, effective February 1, 1947.

‡ Will not apply on Minnesota intrastate traffic.

▲ Change other than advance or reduction.

A disposition order will not be accepted under these rules at or to a station or to a point of delivery against which an embargo is in force, but a shipment made under an authorized permit is not subject to this condition.

(SF 5963–1138)

By using the triangle symbol ▲ the carriers solemnly stated that the words so marked were mere clarification which did not change the rate, that what had become explicit in the amended definition was always implicit in the original. All agree that under the amended definition the rate from Sweetgrass for these shipments would be 68¢—therefore that was the rate under the original. The carriers were right and appellant is right, and for appellee now to deny it would be to say that the amendment amounted to a misrepresentation.

History of the clarification

The carriers had taken the position all along that appellant's view (the original basis) was correct. An informal opinion had been solicited from an officer of the Interstate Commerce Commission. In that connection the carriers argued just the opposite of the way appellee argues now. They said that the informal opinion was "in error" because the rule should be read in light of the established trade principle that each factor of a flat combination rate carried with it the privileges pertaining to each factor, and that the shipment in the United States, under established principles of tariff reading, should be treated ratewise as having originated at the border point. They argued that the point at which the Canadian grain became "subject to

have done. Numerous undercharges outstanding unquote. 108."

and your reply of the same date, viz:

"108. Have discussed question with Assistant Directors Brown and Chapdelain of Commission. They rule informally in which I concur that the inspections and reconsignments in Canada or at the border must be counted C–66."

Pursuant to communication received from an interested member of the National Diversion and Reconsignment Committee, as quoted in Docket Advice No. NDR–1106 of April 27, 1945, copy attached hereto, the Committee at meeting held here May 23, 1945, decided to refer the subject to a Special Committee for consideration and report.

The Special Committee at meeting held here June 1, 1945, after considering the subject decided that the Interstate Commerce Commission's informal ruling is in error, for the reason that it is an established rule of the I. C. C. that each factor of a flat combination of rates carries with it the privileges pertaining to each of those factors, and that in the instant case since there is a flat combination over the international border point the shipment should be treated the same as if originating at such border point and be permitted the same number of inspections as is authorized in connection with the local rate from and to border point, namely two inspections (or one inspection in addition to a diversion or reconsignment without inspection) en route and one inspection (or diversion or reconsignment) within the switching limits of the destination at which the car is unloaded. The foregoing is in harmony with Rule 5 of the General Diversion

and Reconsignment Rules governing Grain, Seeds, etc., carload, held for Inspection and Disposition Orders, the second paragraph of which reads, viz:

"In applying this rule, the number of stops for inspection (or diversion or reconsignments without inspection) shall be reckoned from the last point of loading of car or from the point at which it becomes subject to combination of rates as provided in this item."

and it will be noted from the above quoted paragraph that if the shipment becomes subject to combination of rates the number of stops shall be reckoned to and from the point at which such combination becomes effective. Inasmuch as shipments from Canada usually move on combination of local rates to and from International border points, the shipper is entitled to the same consideration as if the movement had been entirely between points within the United States moving on combination of local rates.

The National Diversion and Reconsignment Committee has concurred in the views of the Special Committee stated above.

Kindly advise if you will undertake to have the Interstate Commerce Commission accept the foregoing conclusion in lieu of its informal ruling mentioned in your telegram herein referred to.

Yours very truly,

/s/ E. Morris, *Chairman.*

P. S.: In view of the foregoing conclusions there is at the present time before the members of the National Diversion and Reconsignment Committee, the question of amending the involved Rule 5, by eliminating from the second

paragraph the following words "as provided in this item."

E. M.

Rather than go through a formal proceeding, the carriers decided to dispose of the matter by simply filing the clarification, in which they adhered to appellant's view that for purposes of applying the Great Northern tariffs to these shipments the point of origin was to be regarded as the border point. Beyond that point the scope of the tariffs did not extend, either northward in space or backward in time. The scope of Rule 143 is expressly limited on the title page to a consideration of diversions, reconsignments, or inspections on the Great Northern System (R. 66).

By way of analogy, it is observed that the Southern Pacific time table provides special rules governing certain stops of westbound trains to San Francisco. One rule provides that certain stops will be made only to detrain passengers from Ogden or beyond. Supposing, however, that the rule merely provided for the train to stop for passengers from Ogden, and that a traveler from Chicago via Ogden should desire to utilize the privilege, it would be unthinkable for the conductor to deny him the privilege on the ground that his point of loading was beyond Ogden. That is because by common usage a rule granting the privilege to passengers from Ogden (which is the Southern Pacific's starting point) would be understood to extend to passengers from beyond Ogden.

Similarly, in applying Rule 143 as originally worded, appellant submits that the privileges which were extended to shipments loaded at Sweetgrass (which is the

Great Northern's starting point) apply likewise by customary understanding to shipments loaded beyond Sweetgrass. In other words, it is enough to state that the point of loading for these shipments was "Sweetgrass or beyond".

The carriers' clarification ought to have ended this controversy. At any rate, there is sufficient ambiguity to warrant the Court's applying the standard rules of construction as urged in appellant's opening brief. All of the rules point to appellant's interpretation.

C. In any event, appellant is surely entitled to have these shipments treated as favorably as if they had been loaded at Sweetgrass

In Point B of the opening brief (pp. 21–23) appellant argues that if appellee's present view of Rule 143 is correct, then the "privilege" of reconsignment has boomeranged into a serious penalty, and that appellant is therefore entitled to waive the inverted benefit. The Interstate Commerce Commission was quoted defining the difference between reconsignment and reshipment. The lexicon of tariff terminology is not scientifically exact or uniform, but it seems clear that the essence of reconsignment is an offer by the carriers, when applying their tariffs, to treat a reshipment as if it had not occurred and to apply the principle of constructive continuity of transportation right through the point where the shipment actually stopped and was reshipped in order to confer the privilege of a lower rate through the reshipment point.

The word "reconsignment" is not apparently universally used. Where the Great Northern Rules Tariff's

title speaks of "rules and charges governing the diversion or reconsignment * * *" a corresponding Canadian Pacific Tariff's title speaks of "stopover and reshipping arrangements." Canadian Pacific Railway Co. Tariff No. E–3050, Section No. 3, I. C. C. No. E–2295.[1] Item No. 90 therein refers to shipments "reshipped without breaking bulk."

Our point is that a reconsignment is a reshipment, to which the carriers have agreed to apply the principle of constructive continuity, but that if the constructive continuity (being a special privilege) operates to penalize, the shipper is entitled to ignore the fiction and to have the reshipment stand as a simple reshipment.

Appellee asserts that "the instant shipments were never intended for delivery at Sweetgrass, Montana. Their original destination as through shipments * * * was Ogden, Utah." Appellee also asserts that the reconsignments were accomplished at Sweetgrass solely for convenience from the standpoint of railroad operation, arguing that nothing of consequence really happened at Sweetgrass, even going so far as to say that "there is absolutely nothing under the facts or by way of any fiction which would constitute a reshipment from that point" (Appellee, p. 21). Both of these assertions are incorrect, insofar as the United States carriers are concerned.

The significance of Sweetgrass can be appreciated from the following *précis* of what happened there. A Canadian shipper (not appellant) shipped the grain to Sweetgrass with freight thereto prepaid, and with in-

[1] Filed with the Interstate Commerce Commission for information only.

structions to Canadian Pacific to put the cars on Great Northern tracks at Sweetgrass for the order of appellant. The sale of the grain and the passage of title thereto were accomplished at Sweetgrass. Canadian Pacific's duty to its shipper under its tariffs and under its contracts of carriage was completed at Sweetgrass. Great Northern never actually had any relation with the original shipper, whose bills of lading were "accomplished" at Sweetgrass.

Before the grain arrived at Sweetgrass, Great Northern had received instructions from appellant to "divert" it to Spokane "for inspection and diversion." Instructions on the Canadian Pacific bills of lading for movement to Ogden as a diversion point (not as a destination) were eradicated from the picture before Great Northern received the shipments and were therefore never effective. When Great Northern received the shipments at Sweetgrass, appellant, who became the owner and the shipper at Sweetgrass, surrendered the Canadian bills of lading and became thus entitled to new bills of lading issued by Great Northern at Sweetgrass. What had happened was that Sweetgrass had replaced Ogden.

The cars were then received by Great Northern for transportation under the terms of a United States Uniform Bill of Lading, issuable to appellant to Spokane for inspection and diversion, being there reconsigned to Petaluma. Great Northern's obligation was to transport the shipments under its tariffs from Sweetgrass. What we have is not single, uninterrupted shipments through Sweetgrass but combinations of a shipment by one shipper over one carrier under one bill of

lading and one tariff into Sweetgrass, with another shipment by another shipper over another carrier under another bill of lading and another tariff out of Sweetgrass. No rituals of unloading and loading at Sweetgrass were required for the procedure of the shipper from Sweetgrass.

CONCLUSION

All that appellant seeks is the benefits granted to shipments from Sweetgrass, under the tariffs which, although complicated, require the carrier to accept appellant's interpretation—either on their plain wording or on application of the established rules of construction.

Respectfully submitted.

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